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No. 99-1979

Supreme Court, U.S.
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In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Matthew Williams, Deceased,

Petitioner,

v.

ARCO MARINE, INC.; ATLANTIC RICHFIELD COMPANY; CHEVRON U.S.A., INC.; UNOCAL CORPORATION and NATIONAL BULK CARRIERS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

There is no parent or publically held corporation owning more than 10% of the stock of any of the Respondent corporations. The Ludwig Group, Inc., provides management and administration services to National Bulk Carriers, Inc. The stock of National Bulk Carriers, Inc. has never been publically held and is presently held by two foundations: Virginia and D.K. Ludwig Fund for Cancer Research and The Virginia and D.K. Ludwig Fund for Cancer Research, Inter Vivos.

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REASONS FOR DENYING THE WRIT

Petitioner has misperceived the substance of the decision by the Supreme Court of Alabama, and has relied upon that misperception in contending that there is a federal question worthy of review by this Court. In fact, the decision of the trial court as approved by the Supreme Court of Alabama was based upon the insufficiency of evidence offered by plaintiff to create a material issue of disputed fact regarding decedent's exposure to benzene, and did not involve any interpretation or application of any federal statute or other rule of federal substantive law.[1] Because there is no federal question implicated in the decision of the Supreme Court of Alabama, Petitioner's effort to invoke the jurisdiction of this Court is misguided. Even if jurisdiction lay in this Court to review the underlying decision, this Court should nevertheless deny the petition because the case was decided correctly under state law without impinging Petitioner's federal rights and because, in any event, this Court should not grant certiorari simply to review evidence and/or discuss specific facts.

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[1] Petitioner has never offered any evidence that decedent was exposed to benzene or any benzene-containing products aboard any vessels owned, operated, or controlled by Respondents Unocal Corporation, Arco Marine, Inc., Atlantic Richfield Company and National Bulk Carriers, Inc. The only Respondent against whom Petitioner offered any evidence in opposition to the summary judgment motion is Chevron U.S.A., Inc., formerly known as Gulf Oil Corporation.

I. PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Petitioner has failed to state or identify a compelling reason for granting this writ of certiorari, as required by Supreme Court Rule 10. Moreover, Petitioner has made no showing that the decision of the Supreme Court of Alabama is in conflict with the decision of another state court of last resort or of a United States court of appeals. Additionally, Petitioner has made no showing that this case involves an important unsettled question of federal law or that the Supreme Court of Alabama decided an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, it appears that Petitioner here simply seeks review of alleged erroneous factual findings or misapplication of properly stated law, the very type of review "rarely granted" under the strictures of Supreme Court Rule 10.

II. THIS CASE IS NOT OF A NATURE APPROPRIATE FOR REVIEW BY THIS COURT.

Respondents cannot improve on what was said by Justices Stewart and Frankfurter in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), the case upon which Petitioner primarily relies in seeking review. Justice Stewart, recognizing that the case presented only a sufficiency of the evidence issue, stated:

> Cases like this, I am fairly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is the sufficiency of the evidence, seems to me not

> only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here.

Sentilles, 361 U.S. at 111 (Stewart, J., concurring). Justice Frankfurter agreed, stating: " 'We do not grant a certiorari to review evidence and discuss specific facts.' " *Sentilles*, 361 U.S. at 111 (Frankfurter, J., dissenting), quoting from Justice Holmes in *United States v. Johnston*, 268 U.S. 220, 227 (1924). Justice Frankfurter went on to observe: "As a general practice the Court does not review cases involving merely individualized circumstances not unlike the type of factual situations arising in the application of the Federal Employers' Liability Act and the Jones Act." *Sentilles*, 361 U.S. at 113 (Frankfurter, J., dissenting).

These statements apply equally to the individualized circumstances and factual situations arising out of this Jones Act case.

III. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.

The case below, as it relates to Petitioner's Jones Act claim, involved two basic questions: (1) Whether Petitioner had offered sufficient admissible evidence of exposure to benzene to create a material issue of disputed fact,[2] and (2) Whether the expert testimony offered by

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[2] The benzene exposure issue was material and fundamental to the issue whether Respondents provided decedent with a safe place to work, a primary element of Petitioner's Jones Act claim.

Petitioner in opposition to Respondents' Motions for Summary Judgment was admissible. The Supreme Court of Alabama answered both of these questions in the negative, and concluded that the trial court had therefore acted properly in granting Respondents' Motions for Summary Judgment.

Conversely, the question presented in this Court by Petitioner focuses on an alleged application of "a strict common-law causation standard to medical evidence." Pet. i. In fact, no issue of medical causation was ever addressed by either the Supreme Court of Alabama or the trial court, because the courts found that Petitioner failed to offer sufficient admissible evidence of exposure to benzene to create a material issue of disputed fact.

The Supreme Court of Alabama held, in no uncertain terms, that Petitioner did not offer sufficient evidence of exposure to benzene to create a material issue of disputed fact. App. 6. Petitioner's assertion to the contrary notwithstanding, the court below therefore never reached the next question – whether benzene exposure did cause or could have caused decedent's multiple myeloma. That holding was proper in all respects and does not merit review by this Court.

The courts below held that Petitioner's exposure evidence only consisted of potential or possible shipboard exposure to benzene at some unknown concentration for an unknown duration aboard some of Respondent Chevron/Gulf's vessels. The trial court held that such evidence was not sufficient in this particular case to form the factual basis to support a finding of an unsafe workplace under the Jones Act or to form the factual basis for the

opinions offered by Petitioner's expert witnesses. Therefore, the Supreme Court of Alabama, in affirming, held that (1) Petitioner's evidence did not create a material issue of disputed fact; and (2) Petitioner's evidence was insufficient to defeat Respondents' summary judgment motions.

IV. THE PETITIONER HAS MISSTATED THE CONTROLLING STANDARD FOR JONES ACT CASES AND NO FEDERAL QUESTION IS IMPLICATED.

The Petitioner argues, without citation, that "[u]nder the controlling standard of this Court, Petitioner need only present evidence that allows one to reasonably infer exposure." In Petitioner's apparent view, evidence that his decedent might have been exposed to some unquantified concentration of benzene at some time in the past would, without regard to how much exposure, for how long, over what period of time, with regard to any shipboard exposure aboard some of Respondent Chevron/Gulf's vessels, be sufficient to permit a jury to infer that such exposure created an unsafe place to work and caused him to develop multiple myeloma.

That certainly wasn't the import of this Court's decision in *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959), the decision on which Petitioner so strongly relies. To the contrary, *Sentilles* involved a proven discrete exposure and presented only the question of whether the seaman's subsequent illness was causally related to that exposure. Here, on the other hand, Petitioner had the opportunity in the trial court to offer the requisite evidence of exposure to benzene, and he failed to do so. He

could have conducted air sampling on the vessels on which decedent served to assess the benzene concentrations thereon, but he did not do so. He could have conducted air sampling on vessels similar to those on which decedent served to assess the same thing, but he did not do so. He could have biologically monitored seamen serving under the same or similar conditions as those experienced by the decedent, to try to characterize what benzene exposure decedent might have experienced, if any, but he did not do so. He could have relied upon data available in the scientific literature to estimate exposure, but he did not do so. Instead, he sought to fulfill his burden of offering the requisite evidence of benzene exposure by relying upon non-specific recollections of other crewmembers who had served upon various vessels either with the decedent or around the time that the decedent served on such vessels.[3] Such evidence, after being evaluated by the trial court, was found to be insufficient to create a disputed issue of material fact regarding decedent's benzene exposure. Clearly, the facts of this case are substantially different from those presented in *Sentilles*.

Petitioner has not pointed this Court to any Jones Act decision that permits such an abdication of the burden of proof. Whether Petitioner was entitled to the benefit of a relaxed causation standard in attempting to demonstrate

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[3] Again, Petitioner offered no evidence of exposure as to Respondents Unocal Corporation, Arco Marine, Inc., Atlantic Richfield Company and National Bulk Carriers, Inc. Accordingly, there is no basis on which Petitioner can assert an appeal against these Respondents.

that a medical causal relationship existed between the disease that decedent suffered and his shipboard exposures, as Petitioner suggests, was actually not an issue in the trial court or the Supreme Court of Alabama. Rather, the issue was Petitioner's failure to discharge his obligation to first demonstrate by the requisite evidence that decedent in fact experienced such shipboard exposures and at such concentrations and for such durations that an unsafe workplace was created. As noted above, after evaluation of the evidence, the trial court found such evidence lacking, and the Supreme Court of Alabama agreed. Moreover, Petitioner was not entitled, as he seems to assume that he was entitled, to equate possible exposure with an unsafe workplace or with medical causation. Failure to offer the requisite evidence of exposure is fatal to each element of Petitioner's cause of action, and nothing in the Jones Act relaxes that obligation to any extent. To the contrary, even under the Jones Act, a plaintiff must, at the very least, offer evidence sufficient to create a material issue of disputed fact, and in this case, Petitioner utterly failed to do so.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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